BellSouth's systems have experienced little commercial use, but that limited experience suggests potentially serious system inadequacies that have not yet been fully addressed. Moreover, the limited capacity of key systems suggests that performance problems are likely to be far more serious when competitors begin to order unbundled elements or resale services in competitively significant volumes. As explained in Appendix A, attached to this Evaluation and in the Friduss South Carolina Affidavit, attached to this Evaluation as Exhibit 3, BellSouth's failure to institute all of the necessary wholesale performance measurements,[36] prevents a determination that BellSouth is currently in compliance with checklist requirements or that compliance can be assured in the future.

In concluding that BellSouth has failed to comply with the checklist requirements governing OSS, we are mindful of the SCPSC's contrary conclusion. That conclusion was reached, however, before the Commission provided its detailed decision on OSS issues in the Michigan Order. Indeed, other state commissions in the BellSouth region, including the Alabama and Georgia commissions and the staff of the Florida commission, have expressed serious concerns about the adequacy of BellSouth's systems in the wake of the Commission's Michigan Order.[37]

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[36] Affidavit of Michael J. Friduss - South Carolina ¶¶ 77-78 ("Friduss SC Aff."), attached to this Evaluation as Exhibit 3.

[37] See Alabama Public Service Commission, In re Petition for Approval for a Statement of Generally Available Terms and Conditions Pursuant to §252(f) of the Telecommunications Act of 1996 and Notification of Intention to File to Petition for In-Region, InterLATA Authority with the FCC Pursuant to §271 of the Telecommunications Act of 1996, Docket 25835, Order (Oct. 16, 1997) ("Alabama Order"); Florida Public Service Commission, In

Although BellSouth's OSS fails to satisfy checklist requirements, we are encouraged by some aspects of BellSouth's OSS efforts, particularly by BellSouth's work with an independent software vendor to develop an inexpensive, PC-compatible software package that is compatible with BellSouth's EDI interface.[38] BellSouth states that it undertook this work "[t]o assist CLECs of all sizes that want to use EDI without extensive development effort on their side of the EDI interface" and that the software "is readily available to even the small CLEC." Id. The Department supports this approach, which can benefit both CLECs and BOCs by making multiple alternatives available to CLECs while requiring the BOC to support only a single interface on its end. Moreover, such software has the potential, if combined with integrated support for an application-to-application pre-ordering interface, to provide even the smallest CLEC with an integrated pre-ordering/ordering environment such as that presently used by BellSouth's retail representatives.

In Appendix A to this Evaluation, we explain in greater detail numerous concerns about BellSouth's performance and capabilities in providing access to OSS, as well as its deficiencies in reporting wholesale performance. In short, based on the record in this application, we cannot conclude that BellSouth has demonstrated that it satisfies the checklist requirements relating to its

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re Consideration of BellSouth Telecommunications, Inc.'s Entry into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of 1996, Docket No. 960786-TL, Staff Recommendation (Oct. 22, 1997) ("FPSC Staff Recommendation"); "Telephony," Communications Daily, Oct. 30, 1997 ("GAPSC Article").

[38] Affidavit of William N. Stacy, Checklist Compliance (Operations Support Systems) ¶ 53 ("Stacy OSS Aff."), attached to BellSouth's Brief as Appendix A-Volume 4a, Tab 12.

operations support systems.

III. The South Carolina Market Is Not Fully and Irreversibly Open to Competition

The 1996 Act requires the Commission to consult with the Attorney General on all applications under section 271, and authorizes the Attorney General to provide an evaluation of such applications "using any standard the Attorney General considers appropriate."[39] The 1996 Act does not limit the Department's evaluation to any of the specific findings that the Commission is required to make, under section 271(d)(3), before approving an application. Indeed, it does not limit the evaluation to those findings, collectively, though of course the evaluation may be relevant to any or all of those findings. In any event, the Commission is required to accord "substantial weight" to the Department's evaluation.

The Department has concluded that it should evaluate section 271 applications under a standard that requires an applicant to show that the markets in a state have been fully and irreversibly opened to competition. A detailed explanation of that standard, and the reasons the Department has adopted it, is provided in the attached Affidavit and Supplemental Affidavit of Dr. Marius Schwartz, and in previous evaluations submitted by the Department.[40]

In the absence of broad-based commercial entry using the three entry paths contemplated by the 1996 Act, the Department will closely examine competitive conditions in a state, to determine whether significant barriers to competition have been removed, and whether there are

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[39] 47 U.S.C. §271(d)(2)(A).

[40] See DOJ Oklahoma Evaluation at 36-51; DOJ Michigan Evaluation at 29-31.

objective criteria to ensure that competing carriers receive appropriate access to essential inputs, even after an application under section 271 has been approved. Under this standard, BellSouth has not shown that the market in South Carolina is fully and irreversibly open to competition, and its application should be denied.

A. The Minimal Level of Competition in South Carolina Does Not Provide Evidence That Local Markets Are Fully and Irreversibly Open

At this time, BellSouth faces no significant competition in local exchange services in South Carolina. The competitive situation in South Carolina is reviewed in more detail in Appendix B to this Evaluation. We are not aware of any operational facilities-based local exchange competitor at the present time. As of September 11, 1997, only 573 residential lines and 1785 business lines had been resold in the entire state.[41] Of the 573 resold residential lines identified in BellSouth's application, over 90% were resold by a single company, which has only a resale arrangement with BellSouth, and, therefore, would presently be unable to provide facilities-based competition. The resale of lines to business is only slightly more robust and diverse. Eleven companies are reselling at least a single business line, though three companies account for approximately 98% of BellSouth's 1785 resold lines.

Despite the limited operations today of competitors, a substantial number of companies have expressed an interest in providing local services in the state. As of the date of BellSouth's application, 83 telecommunications carriers had executed agreements with BellSouth, and sixteen companies had been certified to provide competing local telephone service in South Carolina.

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[41] Wright Aff. ¶ 24.

Seven of those companies -- ACSI, AT&T, DeltaCom, Hart Communications, Intermedia, KMC Telecom, and MCI -- have approved interconnection agreements for services other than resale. Two companies -- ACSI and DeltaCom -- are moving towards the provision of facilities-based local service.

ACSI currently provides non-switched dedicated services, including special access, data services, and private line services, over its own fiber optic facilities in Columbia, Charleston, Greenville, and Spartanburg. ACSI plans to have an operational switch in Greenville during in the first quarter of 1998, which it will use to serve business customers. ACSI is currently providing resold services to a small number of business customers in South Carolina. ACSI has not yet purchased UNEs from BellSouth, but plans to do so when its switch is operational.

As noted in Part I, DeltaCom has indicated that it plans to provide facilities-based local exchange services, and has been moving towards fulfilling that plan.[42] It plans to do so either through the use of a network entirely owned by DeltaCom or through the partial use of BellSouth facilities.[43]

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[42] Moses Aff. ¶ 22.

[43] AT&T and MCI have expressed their intention to provide local exchange services to both residential and business customers in the state using either unbundled network elements or resale. AT&T requested unbundled network elements from BellSouth in March 1996 and interconnection in June 1996 to provide local exchange services via resale, unbundled network elements, and on a facilities basis in South Carolina. A final arbitrated agreement between AT&T and BellSouth was approved on June 20, 1997; AT&T objected to several of the agreement's provisions and filed an appeal with the U.S. District Court of South Carolina on July 18, 1997. AT&T has not begun to provide any local telecommunication services in South Carolina, according to AT&T, because of BellSouth's OSS inadequacies, the lack of cost-based pricing for combined unbundled network elements, and the very low wholesale discount rate.

Given the current minimal level of competition in South Carolina, despite the apparent interest in entering South Carolina by a significant number of competitors, there is no reason to presume that the market is fully open to competition. Therefore, we examine competitive conditions more carefully to see whether any significant barriers continue to impede the growth of competition in South Carolina.

B. Substantial Barriers to Resale Competition and Competition Using Unbundled Elements Remain in Place in South Carolina

As noted above, only two companies, ACSI and DeltaCom, appear to be making substantial efforts at this time to construct new telecommunications networks in South Carolina. These companies, when they become fully operational, may provide important competitive alternatives for consumers, but overall, investment in new facilities appears to have been relatively less attractive to CLECs in South Carolina than in some other states, a fact that may well reflect the demographic and economic characteristics of the state.

The limited investment in new facilities means that for the immediately foreseeable future, competition to serve the large majority of South Carolina consumers -- most residential customers and customers of all kinds outside of the largest urban areas of the state -- can occur only through resale or the use of unbundled network elements. Competitors seeking to use those two entry vehicles will be critically dependent on BellSouth.

MCI has only recently entered the South Carolina market. MCI's interconnection agreement, based in part on the terms obtained by AT&T in its arbitration order, contemplates the purchase of unbundled network elements from BellSouth. According to MCI, plans to provide local exchange service in South Carolina are not progressing because of the lack of adequate OSS and the inability of BellSouth to provision unbundled network elements.

As explained in Parts II.C, and D of this Evaluation, BellSouth has failed to show that competitors can be assured of appropriate access to essential inputs, i.e., that they will receive unbundled elements from BellSouth in a manner that allows them to combine those elements, and that they will have the legally-required access to OSSs that will permit them to compete effectively through the use of resale or unbundled elements. In addition to those deficiencies, BellSouth has failed to show that unbundled elements are currently offered, or will be offered in the future, at prices that will permit entry and effective competition by efficient firms, and has failed to show that it will provide objective measures of its wholesale performance that will ensure that competitors receive nondiscriminatory access to inputs now and in the future.

1. BellSouth Has Not Demonstrated That Current or Future Prices for Unbundled Elements Will Permit Efficient Entry or Effective Competition

Competition through the use of unbundled network elements will be seriously constrained, and may even be impossible, if those elements are not available at appropriate prices. In evaluating pricing arrangements as part of its competitive assessment, the Department will ask whether a BOC has demonstrated that its current prices are, and future prices will be, supported by a reasoned application of an appropriate methodology.

Reasoned Application Of An Appropriate Methodology. In order to conform to the Act, rates for interconnection and access to unbundled elements must be "just, reasonable, and nondiscriminatory," 47 U.S.C. §251(c)(2)(D), see also 47 U.S.C. §252(d)(1), (1)(A)(ii), and "based on the cost (determined without reference to a rate-of-return or other rate-based

proceeding) of providing the interconnection or network element (whichever is applicable)," 47 U.S.C. §252(d)(1)(A)(i); such rates "may include a reasonable profit," 47 U.S.C. §252(d)(1)(B). There have been no judicial decisions concerning the types of rate-making methodologies that are consistent, or inconsistent, with these statutory requirements. In our view, however, there are a variety of forward-looking cost methodologies that are consistent with the statutory requirements, and with the Department's standard for evaluating whether markets are fully and irreversibly open to competition.

Such methodologies, if properly applied, will create incentives for efficient investment by incumbents and potential entrants; will permit effective competition by new entrants on an equal footing, in which the relative efficiency of entrants and incumbents is suitably rewarded by the marketplace; and will stimulate price competition and service improvement for consumers. As well established economic principles make clear, forward-looking costs govern prices and entry decisions in competitive markets, and thus, those principles best promote competition in a market moving from a regulated monopoly to a competitive market.[44]

A variety of forward-looking methodologies also are likely to lead to prices that are "nondiscriminatory." As we have previously explained, the real cost of a network element to a

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[44] See, e.g., Stigler, G., The Theory of Price III (4th ed. 1987); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 and 95-185, FCC 96-325, ¶ 705 & n.1716 (rel. Aug. 8, 1996) ("Local Competition Order"). See also Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989) (ratemaking on the basis of forward-looking costs "mimics the operation of the competitive market"); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1116-17 (7th Cir.), cert. denied, 464 U.S. 891 (1983) ("it is current and anticipated cost, rather than historical cost, that is relevant to business decisions to enter markets and price products").

BOC will be its own forward looking economic cost; charging a higher price to its competitor therefore may be discriminatory and anticompetitive.[45] Prices based on forward-looking economic costs will allow a BOC to obtain the "reasonable profit" allowable under the Act; monopoly profits a BOC might seek at its competitors' expense, thereby depriving customers of the benefits of cost-based prices, would be excluded.

Recognizing that the use of forward-looking cost methodologies is consistent with the 1996 Act and will further its procompetitive purposes and benefit consumers, a significant number of state PUCs have chosen to adopt such methods, see e.g., Local Competition Order ¶ 681, n.1687,[46] as has the Commission,[47] and other federal administrative agencies in related contexts.[48] Of course, the label attached to a particular methodology is not determinative; it is the substance

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[45] Comments of the United States Department of Justice, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, at 28-30 (filed May 16,1996) ("DOJ Local Competition Comments").

[46] According to a recent NARUC report, Telecommunications Competition 1997, Table 4 (Sept. 1997), 32 of 51 reporting commissions have said that they employ some form of forward-looking cost based pricing, including TELRIC or TSLRIC, while 18, including South Carolina, have not adopted such a pricing methodology. The Department does not express an opinion on whether states' characterizations of their pricing methodologies as based on forward looking costs in this report are accurate.

[47] Michigan Order ¶¶ 289-294.

[48] In recent years, for example, the Interstate Commerce Commission and its successor, the Surface Transportation Board, have regulated railroad rates on the basis of forward-looking costs. See, e.g., West Tex. Util. Co. v. Burlington N.R.R., No. 41191, 1996 WL 223724 (I.C.C.) (S.T.B. May 3, 1996), aff'd 114 F.3d 206 (D.C. Cir. 1997); Bituminous Coal -- Hiawatha, Utah, to Moapa, Nevada, 10 I.C.C. 2d 259 (1994); Omaha Pub. Power Dist. v. Burlington N.R.R., 3 I.C.C. 2d 123 (1986).

that counts.

If the prices for unbundled network elements in a state are derived through a methodology other than a forward-looking economic cost methodology, we could not conclude that market is fully open to competition unless, after careful consideration of the reasoning behind the prices on a case-by-case basis, we were able to determine that the alternative standard on which prices are based is consistent with the 1996 Act and permits entry and effective competition by efficient firms.[49]

Some ratemaking methods that were designed to operate in and to preserve a regulated monopoly environment would seem to be fundamentally inconsistent with that standard. For example, use of the "Efficient Component Pricing Rule" to establish prices for unbundled network elements would insulate a BOC's retail prices from competition, thereby discouraging entry in markets where current retail prices exceed competitive levels.[50] Such effects would impede the transition from regulated monopoly telecommunications markets to de-regulated, competitive

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[49] The 1996 Act also requires that all retail services be made available for resale at a wholesale discount (47 U.S.C. §251(c)(4)), and requires states to set the wholesale discount based on an "avoided" cost methodology (47 U.S.C. §252(c)(3)). It follows that a state must also explain how it has set the resale discount consistent with the 1996 Act, including articulating the methodology it has used and how it has applied the methodology. Issues have been raised by several commenters about whether BellSouth's 14.8% resale discount is consistent with the 1996 Act. While the Department does not analyze that issue in this evaluation, as there are several other grounds for denial of the application, this pricing issue would have to be considered before any approval of entry in South Carolina would be possible.

[50] See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Reply Comments of the United States Department of Justice, CC Docket No. 96-98, at 11-13 (filed May 30, 1996) ("DOJ Local Competition Reply Comments")

markets, and would deprive consumers of the benefits of price competition and new investments in telecommunications services.

Similarly, in the pre-Act regulated monopoly environment, universal service objectives were often promoted by insulating incumbent LECs from competition so that they could charge prices substantially above cost for some services, and use the resulting revenues to provide other services at or below cost. At least in some cases, if unbundled network elements are priced above cost, competitors could be discouraged from entering, or if they did enter, could be forced to bear a disproportionate share of the cost of supporting universal service objectives. In any event, their ability to compete on the merits would thereby be impaired.[51]

Whatever methodology is used, a reasoned application to the particular facts is needed. We expect that in most cases, a BOC will be able to demonstrate this by relying on a reasoned pricing decision by a state commission. However, if a state commission has not explained its critical decisions, or has explained them in terms that are inconsistent with procompetitive pricing principles, the Department will require further evidence that prices are consistent with its open-market standard.

Future Prices. Expectations concerning future prices can be as important, or even more important, than current prices. A market will not be "irreversibly" open to competition if there is a substantial risk that the input prices on which competitors depend will be increased to

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[51] All providers of telecommunication services, including but not limited to those that use unbundled elements, "should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(b)(4).

inappropriate levels after a section 271 application has been granted. Such a price increase obviously could impair competitive opportunities in the future. As important, a substantial *risk* of such a price increase can impair competition *now*. Competitors that wish to use unbundled elements in combination with their own facilities will incur significant sunk costs when they invest in their own facilities. Such investment will not be forthcoming *now* if there is a substantial risk that increases in the prices for complementary assets, i.e., unbundled elements, will raise a competitor's total costs to a degree that precludes effective competition.

This does not mean that the prices must be permanently unchangeable. Such rigidity would be undesirable, both because costs change over time, and because adjustments to rate-making methodologies may be appropriate as market conditions change. However, competitors must have sufficient confidence about future prices to justify prudent investments in entry.[52] The basis for such confidence may be provided either by a BOC or by a state commission, through a variety of mechanisms such as long-term contractual arrangements, commitments to appropriate methodologies, and the like. Without some basis for confidence that future prices will be appropriate, we will not consider a market to be fully and irreversibly open to competition.

Pricing of Unbundled Elements in South Carolina. In South Carolina, BellSouth has not demonstrated that current prices permit entry and effective competition by efficient firms, and there is great uncertainty concerning the prices that will be available in the future. Given this

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[52] As Professor Schwartz explained in his affidavit, "[p]rohibitively high prices would render the new access arrangements [i.e., to unbundled network elements] meaningless; to permit efficient local entry, entrants must have adequate assurance that BOC prices for these inputs will remain reasonable and cost-based after interLATA relief is granted." Schwartz Aff. ¶ 22.

uncertainty, it is not surprising that there is no real competition using unbundled elements now, or that competitors' plans to compete in the future are subject to many contingencies.

BellSouth has not attempted to establish independently, in this proceeding, that it offers appropriate prices for unbundled elements. Instead, it relies solely on the determinations of the SCPSC, which it erroneously characterizes as "definitive" or "conclusive" for purposes of its application.[53] However, based on the record in this proceeding, we do not believe the conclusions of the SCPSC, standing alone, support a finding that the market in South Carolina is fully and irreversibly open to competition.

The SCPSC has not articulated a forward-looking cost methodology. Indeed, it has stated that it "has not adopted a particular cost methodology." SCPSC Order at 56. Instead, the prices contained in the SGAT were incorporated from several sources, including the BellSouth/AT&T arbitration, existing tariff rates, and rates negotiated in interconnection agreements with other carriers. Id. at 53. There is no explanation of the costs on which they are based.[54]

With respect to the rates derived from the BellSouth/AT&T arbitration, the SCPSC states

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[53] BellSouth Brief, at 37, 40.

[54] For example, the current wholesale rate structure in South Carolina for unbundled network elements does not include any variation in prices according to the actual costs in unbundled network elements across the state or any explanation as to when such geographically deaveraged prices would become available. In states with significantly varying loop densities, for example, we would expect there to be different unbundled loop prices made available to competitors. We recognize that the process of de-averaging may need to be accomplished over some transition period, but encouraging efficient entry requires that cost-based wholesale rates are the objective of a wholesale pricing structure. The SCPSC has not attempted to explain its departure from this approach here.

only that the rates were "within the bounds" of the cost studies provided by the parties in that arbitration, and that "many" of the rates were within the Commission's proxy rate ranges. Id. at 55. As to prices derived from negotiated interconnection agreements, the SCPSC states only that such rates "were certainly not set by the parties without reference to the cost of the services to be provided." Id. And the SCPSC offers no explanation for its conclusion that rates derived from preexisting tariffs conform to the cost-based pricing requirements of the 1996 Act.

These explanations are surely insufficient to demonstrate that BellSouth's unbundled element prices will permit efficient competition. While there is no single cost methodology that is required, surely some consistently applied methodology is needed.[55] In weighing conflicting cost studies presenting by opposing parties, there must be some reasoned explanation for a decision to accord greater weight to one rather than the other.

The fact that a rate has been negotiated in an interconnection agreement provides no basis for concluding that such a rate is competitively appropriate on a permanent basis for all parties. As the Commission has recognized, incumbent LECs may be able to exercise substantial market power in such negotiations.[56] Potential entrants may accept rates substantially in excess of cost, particularly if by doing so they can avoid the substantial cost and delay of arbitration proceedings,

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[55] See DOJ Oklahoma Evaluation, at 61 ("The [Oklahoma Corporation Commission] arbitrator's decision on the AT&T application did not recommend 'any particular methodology or cost study be adopted at this time.'").

[56] Local Competition Order ¶ 55. See also Schwartz Aff. ¶ 188 ("There is great asymmetry in these bargaining powers--since the dominant incumbent is content to preserve the status quo, while the entrant is clamoring for an agreement.").

or secure more favorable terms with respect to other provisions of their agreement.

The problems with current unbundled element prices are compounded by the great uncertainty concerning future prices. The SCPSC has expressly refused to articulate the methodology, if any, that it will use to establish "permanent" rates, and thus there is no assurance that the "permanent" rates will permit efficient competition using unbundled elements. The "true up" and "price cap" mechanisms in place in South Carolina do not solve these problems. To the extent BellSouth relies on the subsequent "true-up" of current prices to conform to final prices, as a safeguard against excessive current prices, this would not apply to many of the prices in the SGAT, such as those derived from pre-existing tariffs, that are not subject to "true-up". Moreover, where no methodology for permanent pricing has been established a "true-up" only leads to additional uncertainty as to what prices competitors ultimately will have to pay for elements ordered in the interim. The SCPSC's "price cap" on those prices subject to true-up does not adequately address this uncertainty as it only limits, at most, increases on elements already ordered, not prospective price increases on elements generally, which could end up being priced substantially higher than the interim rates. Thus, these mechanisms do not preclude the possibility that in the near future, unbundled element prices may increase significantly, in ways that are both unpredictable and anticompetitive.[57]

In short, the record in this application does not establish that either current or future prices

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[57] See DOJ Oklahoma Evaluation at 62 ("Since it is not yet known what the final Oklahoma prices will be or how they will be determined, the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later.").

for unbundled elements will permit efficient firms to enter and compete effectively. Because of this deficiency, we cannot conclude that the market is fully and irreversibly open to competition using unbundled elements.

The Commission Has Authority To Take Account of Pricing. Although BellSouth apparently concedes that a state commission's conclusions do not bind the Commission as to Track A/ Track B issues, nonprice elements of the checklist, or the public interest test, it argues that "[t]he SCPSC's pricing determinations are conclusive" for section 271 purposes and that the Commission lacks authority to take account of a state's wholesale pricing structure.[58] From the Department's standpoint, this argument is plainly wrong, as the 1996 Act mandates that the Department undertake a competitive assessment using "any standard the Attorney General considers appropriate"[59] and that the Commission must give "substantial weight" to this Evaluation.[60] In our view, an assessment about whether the local market has been "fully and irreversible opened to competition"--the inquiry we deem appropriate under this statutory mandate--necessarily requires some assurance that the prices in place--and which will continue to be available--reflect procompetitive pricing principles. The Commission is free to give effect to our Evaluation about the pricing structure however it chooses; but in order to follow the statutory directive of giving substantial weight to our Evaluation, the Commission must retain--by

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58 BellSouth Brief, at 37.

59 47 U.S.C. §271(d)(2)(A).

60 Id.

necessary implication--the authority to do so in exercising its authority under section 271.

2. Bell South Has Failed to Institute Performance Measurements Needed to Ensure Consistent Wholesale Performance

A conclusion that a market has been "fully and irreversibly opened to competition" requires both a demonstration that the competitive conditions currently in place will foster efficient competition, as well as assurances that those conditions will remain in place after a section 271 application has been granted. In terms of wholesale performance -- where a BOC's systems will be critical to enabling its competitors to succeed in the marketplace -- an appropriate means of "benchmarking" performance is needed. As we have explained previously, we examine whether a BOC has established (1) performance measures and reporting requirements so that wholesale performance can be measured; (2) performance standards -- i.e., commitments made by the BOC as to its anticipated levels of performance; and (3) performance benchmarks -- i.e., a track record of performance. These steps will permit an assessment of current performance and will enable competitors and regulators to more effectively address any post-entry "backsliding" from prior performance through contractual, regulatory, or antitrust remedies.

BellSouth has made several important commitments to gather and maintain performance data. First, BellSouth has implemented a data warehouse, separate from the mainframe computers on which its OSSs run, in which raw data relating to performance can be stored and through which it can be queried and analyzed.[61] Second, BellSouth states that it is capturing for

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[61] Affidavit of William N. Stacy, Checklist Compliance (Performance Measures) ¶ 13 ("Stacy Performance Aff."), attached to BellSouth Brief as Appendix A-Volume 5, Tab 13.

subsequent analysis "[e]very order processed by BellSouth for both its retail units and its CLEC customers." Id. ¶ 14. Third, BellSouth states that it plans to allow CLECs to directly access the data warehouse to perform their own analyses. Id. ¶ 15. BellSouth is to be commended for committing itself to such a system for gathering, storing, and providing access to performance data. BellSouth's approach is clearly a desirable way to proceed, and we strongly support these commitments.

Notwithstanding this desirable architecture, as discussed in Appendix A and the Friduss SC Aff., BellSouth has failed to "provide[] sufficient performance measures to make a determination of parity or adequacy in the provision of resale or UNE products and services to CLECs." Friduss SC Aff. ¶ 78.[62] Most significantly, BellSouth is not providing actual installation intervals, instead relying on the "percentage of due dates missed." Yet the type of measurement upon which BellSouth relies is not sufficient to demonstrate parity: if BellSouth were to miss 10% of scheduled due dates for both BellSouth retail operations and CLEC customers but missed the scheduled date by an average of one day for its own customers and an average of seven days for CLEC customers, BellSouth's measurement would be equal and yet would conceal a significant lack of parity. As the Department and the Commission have previously concluded, "[p]roviding resale services in substantially the same time as analogous retail services is probably

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[62] If a BOC can establish that an effective substitute can serve the same purpose as the measures outlined here, the Department, of course, would be willing to consider the use of a substitute measure.

the most fundamental parity requirement in Section 251."[63]

In addition, BellSouth has no performance measurements for pre-ordering functions; few measurements for ordering functions; and no measurements for billing timeliness, accuracy and completeness. BellSouth is also missing numerous significant measurements involving service order quality, operator services, directory assistance, and 911 functions. Also, while BellSouth has committed to measuring firm order confirmation cycle time and reject cycle time, the development of these measurements is incomplete and thus results are not yet available. Collectively, these deficiencies prevent any conclusion that adequate, nondiscriminatory performance by BellSouth can be assured now or in the future.

Given BellSouth's lack of performance measures in a number of crucial areas, we also are unable to determine whether BellSouth has established performance standards that are enforceable as to these areas, as well as a track record, or benchmark, of wholesale performance. As is true with our analysis of OSS generally, our insistence on performance benchmarks does not require any particular level of use in South Carolina. Appropriate benchmarks may be established through commercial performance elsewhere in the BellSouth region. In the event that a BOC is not able to set a benchmark through actual use -- though we doubt that any region will not have some actual competitive entry -- the Department would consider other means of ensuring adequate performance, including enforceable performance standards and other means of demonstrating wholesale capability -- i.e., carrier-to-carrier testing, independent auditing, or internal testing. In

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[63] Appendix A to DOJ Michigan Evaluation at A-12, quoted with approval in Michigan Order ¶ 167.

this case, however, BellSouth has not yet instituted the necessary performance measures, adopted enforceable performance standards, or demonstrated a satisfactory performance benchmark (through actual use or otherwise). Thus, given our inability to conclude that the necessary protections against backsliding are in place, we cannot conclude that the market has been fully and irreversibly opened to competition.

C. BellSouth's "Public Interest" Arguments Do Not Justify Approval of This Application

BellSouth erroneously contends that the benefits of allowing its entry now into the interLATA market in South Carolina warrant approval of this application under the "public interest" standard. BellSouth and its economic experts significantly overvalue the benefits of the BOC's long distance entry now, and undervalue the benefits to be gained from opening BellSouth's local markets, as explained in the Supplemental Affidavit of Marius Schwartz.

We agree that there could be competitive benefits from BOC entry into long distance markets, but the estimates of the size of those benefits provided by BellSouth and some of its economic experts, as well as experts retained by the BOCs in previous section 271 entry applications, appear on closer analysis to rest on unconvincing analytical and empirical assumptions. Schwartz Supp. Aff. ¶¶ 60-84. The economic incentives of the BOCs to cut prices substantially on entering interLATA markets are considerably weaker than the BOCs' experts claim. Id. ¶¶ 63-76. Long-distance markets already are significantly more competitive than local markets. Particularly, higher-volume residential and business customers benefit from considerable rivalry. Id. ¶¶ 18, 79, 84. The BOC experts that have estimated large price reductions from BOC

interLATA entry, based on experiences with SNET and GTE, have exaggerated the benefits realized by consumers from interLATA competition by those ILECs, by failing to take into account the best available rates from the interexchange carriers already in the market and focusing primarily on undiscounted AT&T rates, and the less favorable of the rate plans AT&T offers. Id. ¶¶ 80-83. This does not mean that consumers have realized no benefits from entry by ILECs such as SNET, but the BOCs' experts have not provided an analysis that would adequately support the large benefits they project from BOC entry.

Still more important, BellSouth and its economic experts, as well as experts retained by BOCs in previous entry applications, have failed to give adequate consideration to the more substantial benefits to be gained from requiring that the BOC's local markets be opened before allowing interLATA entry. Their analyses have simply assumed that the requirements of section 271 would be satisfied, or addressed the benefits of local competition in a cursory manner that undervalues their importance. The Department's analysis and that of Dr. Schwartz, in contrast, give full consideration to competitive effects in both the interLATA and the local markets. Because the local markets are both much larger than interLATA markets and still largely monopolistic, the benefits from opening the BOCs' local markets to competition prior to allowing BOC interLATA entry are likely to substantially exceed the benefits to be gained from more rapid BOC participation in long distance markets. Id. ¶¶ 14-25. Ensuring BOC cooperation requires conditioning BOC long distance market entry on the Department's standard of local markets being fully and irreversibly open. Experiences with regulating other complex new access

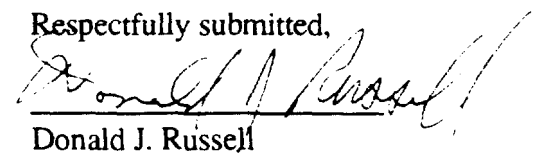
arrangements (e.g., interLATA toll, intraLATA toll, and open network architecture) indicates that opening local markets would take much longer without this cooperation. And thus the Department's entry standard, far from delaying competition, promotes it, more than would dependence on post-interLATA entry enforcement to compel the BOCs to open their local markets. Id. ¶¶ 35-59.

Finally, the Department's analysis recognizes, as the analyses by the BOCs' experts do not, that authorization of BOC interLATA entry will not promote local entry if substantial barriers to local entry remain in place. BellSouth and its experts focus only on the incentives of interexchange carriers and other providers to enter the local markets. The Department does not endorse that aspect of BellSouth's analysis, which fails to take into account important differences between various types of entrants. Id. ¶ 29. But, more significantly, BellSouth and the BOCs' experts fail to appreciate that regardless of the incentives a provider may have to enter local markets, if it does not have an adequate opportunity to enter, then entry will not occur. Id. ¶¶ 30-34. Under the 1996 Act, for that opportunity to exist, the BOC must be presently willing and able to provide at cost-based rates what competitors require for entry at various scales of operation, using interconnected separate facilities, unbundled elements and resale. BellSouth has not shown that this opportunity now exists in South Carolina, and so its interLATA entry would not be in the public interest.

IV. Conclusion

BellSouth has not satisfied the requirements of the competitive checklist, and has not taken all measures needed to ensure that local markets in South Carolina are fully and irreversibly open to competition. For these reasons, BellSouth's application for in-region interLATA entry in South Carolina under section 271 of the Telecommunications Act should be denied.

Respectfully submitted,



Joel I. Klein
Assistant Attorney General
Antitrust Division

Lawrence R. Fullerton
Deputy Assistant Attorney General
Antitrust Division

Thomas G. Krattenmaker
Special Counsel for Policy and
Regulatory Affairs
Antitrust Division

Philip J. Weiser
Senior Counsel
Antitrust Division

Donald J. Russell
Chief
Carl Willner
Frank G. Lamancusa
Brent E. Marshall
Luin Fitch
Juanita Harris
Attorneys
Telecommunications Task Force

W. Robert Majure
Assistant Chief
Economic Regulatory Section

Antitrust Division
U.S. Department of Justice
1401 H Street, N.W., Suite 8000
Washington, DC 20530
(202) 514-5621

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APPENDIX A

Wholesale Support Processes and Performance Measures

In this Appendix, we examine BellSouth's wholesale support processes–the automated and manual processes required to make resale services and unbundled elements, among other items, meaningfully available to competitors–and performance measures under the principles set forth in the Commission's decision on Ameritech's section 271 Michigan application; the Department's Evaluation regarding SBC's section 271 Oklahoma application, filed on May 16, 1997; and the Department's Evaluation regarding Ameritech's section 271 Michigan application, filed on June 25, 1997.[1]

I. Wholesale Support Processes Overview

In evaluating BOC applications under section 271, the Department considers whether a BOC has made resale services and unbundled elements practicably available by providing them via wholesale support processes, including the critical access to OSS functions that provide needed functionality and are demonstrated to operate in a reliable, nondiscriminatory manner at reasonably foreseeable volumes, to ensure that entrants have a meaningful opportunity to compete.[2] As the Commission has stated, "we seek to ensure that a new entrant's decision to enter the local exchange

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[1] *See generally Michigan Order* ¶¶ 128-221; DOJ Oklahoma Evaluation at 26-30, App. A, Ex. D (Affidavit of Michael J. Friduss); DOJ Michigan Evaluation at 21-24, 38-40, App. A. Comments on the current application are cited herein by party name, *e.g.*, "Sprint Comments"; affidavits, declarations, and such are cited by party name and affiant name, *e.g.*, "AT&T Bradbury Aff."

[2] DOJ Oklahoma Evaluation at 68-71.

market in a particular state is based on the new entrant's business considerations, rather than the availability or unavailability of particular OSS functions." *Michigan Order* ¶ 133.

A. FCC Standard[3]

As explained in the Michigan Order, the Commission will first consider "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them." *Michigan Order* ¶ 136.[4] As to the *functionality* of those systems, the Commission determined that "[f]or those functions that the BOC itself accesses electronically, the BOC must provide equivalent electronic access for competing carriers" and that "the BOC must ensure that its operations support systems are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions." *Id.* ¶ 137. As to the *support* of those systems, the Commission made particularly detailed determinations:

> A BOC . . . is obligated to provide competing carriers with the specifications necessary to instruct competing carriers on how to modify or design their systems in a manner that will enable them to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access. The BOC must provide competing carriers with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links, and into the legacy systems as quickly and efficiently as possible. In addition, the BOC must disclose to competing

[3] For purposes of assessing checklist compliance and the openness of a BOC's local market under our competitive standard, the Department will employ the inquiry adopted by the Commission regarding OSS, as it offers the best means for ensuring that the necessary functions are available and will remain available when called upon in greater volumes.

[4] *See also* DOJ Oklahoma Evaluation, App. A at 69 ("The BOC must build its part of an interface and provide CLECs with information and cooperation sufficient to allow the CLECs to construct their part of the interface to the BOC.")